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Supreme Court Monitoring of the United States Courts of Appeals En Banc

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The modern Supreme Court agrees to hear only a handful of cases each term. The Rehnquist Court has granted certiorari to less than four percent of petitions, accounting for less than one percent of all cases decided by courts of appeals. Some Court observers have hypothesized that the Court is more likely to review cases decided by courts of appeals en banc. They argue that, because legal issues heard en banc pose closer and more salient questions, these cases are more likely to be reviewed by the Supreme Court. The mere fact of en banc consideration is notable because all circuits combined sit en banc in only 80 or 90 cases a year. But other Court observers have proffered that the Supreme Court will be less likely to review a decision in which all judges of a circuit have participated because the legal issues have been more fully argued and exhaustively considered.

This article considers systematically whether the Supreme Court is more likely to review an en banc court of appeals de-

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cision than a panel decision. First, we consider Supreme Court review of en banc cases during the Rehnquist Court. Then, in a multivariate empirical analysis of a three-circuit subset of those cases, we control for other variables found to influence the Court's certiorari decision, such as Solicitor General or amicus curiae support for the certiorari petition, a dissent from the court of appeal's opinion, an outcome contrary to the Court's ideological composition, and an intercircuit conflict. The discussion is situated in a larger context of how legal scholars and political scientists have addressed the Rehnquist Court's shrunken caseload from both empirical and policy perspectives.

I. INTRODUCTION

In the October 1999 term, the United States Supreme Court continued its decade-long trend of deciding fewer than 100 fully argued cases. The Court decided on the merits 79 cases in 74 opinions, representing less than four percent of paid petitions and approximately one percent of all petitions.[1] In two instances, the Court reviewed decisions issued after consideration by the entire court of appeals, that is "en banc," rather than by the standard three-judge panel.[2] By comparison, less than one-half of one percent of circuit opinions were decided en banc during the previous year.[3]

[1] On the decade-long trend, see Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 S Ct Rev 403. For data on the 1999 Term, see Supreme Court of the United States, *2000 Year-End Report on the Federal Judiciary*, http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html (visited April 2, 2001) (reporting that 2,092 paid petitions were filed with the Court in the 1999 term as well as 5,282 *in forma pauperis* petitions and that the Court heard arguments in 83 cases, disposing of 79 cases in 74 signed opinions). In the prior term, the Court disposed of 84 cases in 75 opinions. Id.

[2] The two cases were *United States v Morrison*, 529 US 598 (2000), aff'g *Brzonkala v Virginia Polytechnic Institute and State Univ*, 169 F3d 820 (4th Cir 1999) (en banc); and *Hartford Underwriters Ins Co v Union Planters Bank, N.A.*, 530 US 1 (2000), aff'g *In re Hen House Interstate, Inc*, 177 F3d 719 (8th Cir 1999) (en banc). During the 1999 Term the Court also granted certiorari in three other en banc cases, but did not reach the merits during the Term. See *Hope Clinic v Ryan*, 195 F3d 857 (7th Cir 1999) (en banc), cert granted and remanded for reconsideration, 120 S Ct 2738 (2000); *Alsbrook v City of Maumelle*, 184 F3d 999 (8th Cir 1999) (en banc), cert granted in part, *Alsbrook v Arkansas*, 528 US 1146 (2000), cert dismissed, 529 US 1001 (2000); *Atwater v City of Lago Vista*, 195 F3d 242 (5th Cir 1999) (en banc), cert granted, 120 S Ct 2715 (2000) (scheduled for argument in 2000 Term).

[3] See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts: 1999 Annual Report of the Director* Table S-1 (1999), also available at <http://www.uscourts.gov/judbus1999/contents.html> (visited April 2, 2001).

That these decisions by the Supreme Court and en banc decisions by the Courts of Appeals are comparatively rare events increases rather than diminishes their significance. In both contexts, courts place cases on their dockets by discretionary action, thereby setting their own agendas and departing from the passivity that typifies most judicial tribunals. And in both contexts, courts are declaring law in a particularly authoritative manner.

Scholars have examined closely the gatekeeping function of the Supreme Court's discretionary jurisdiction, seeking to explain the certiorari decisions of the Court and the votes of individual justices, as well as the effects of the Court's case-selection power.[4] To a lesser extent, researchers also have focused attention on the en banc process.[5] The interaction between the two phenomena has received comparatively little attention. This article considers that interaction.

The article proceeds as follows. Part II describes the Supreme Court's certiorari process and the considerable literature that has developed to explain the justices' case selection. Part II then considers the literature analyzing en banc decisionmaking by the U.S. Courts of Appeals. Various commentators suggest both that en banc decisions are less likely and that they are more likely to be reviewed by the Supreme Court. Part II concludes with a review of recent scholarship that explores the relationship between en banc decisions and Supreme Court review.

The balance of the article expands upon that literature. Part III describes data on en banc decisions by the 12 general jurisdiction circuit courts during the Rehnquist Court from the 1986 through 1999 Terms. In Part IV we address how often litigants sought Supreme Court review of such cases and how successful they were. To attempt to gain a richer understanding of such litigant and Supreme Court behavior, we describe and analyze our database of en banc decisions of three circuits during the relevant time period that we coded for a variety of possible explanatory variables. We conclude the article by suggesting avenues for further research.

[4] See, for example, Samuel Estreicher and John Sexton, *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process* (Yale U, 1986) ("Estreicher and Sexton, *Redefining the Supreme Court's Role*"); Richard L. Pacelle, Jr., *The Transformation of the Supreme Court's Agenda from the New Deal to the Reagan Administration* (Westview, 1991) ("Pacelle, *Supreme Court's Agenda*"); Lawrence A. Baum, *Policy Goals in Judicial Gate-Keeping: A Proximity Model of Discretionary Jurisdiction*, 21 Am J Pol Sci 31 (1977); Gerhard Casper and Richard A. Posner, *A Study of the Supreme Court's Caseload*, 3 J Legal Stud 339, 362-68 (1974). See sources cited in notes 7-11, 50-51, 53, and 59-64.

[5] See sources cited in notes 21-27.

II. DISCRETIONARY REVIEW BY THE SUPREME COURT AND THE COURTS OF APPEALS

A. Supreme Court and the Writ of Certiorari

Since the Judiciary Act of 1925, the Supreme Court has had nearly complete discretionary authority over its docket, selecting most cases that come before it through the writ of certiorari. Over the last several decades, the Court has granted full review to less than one-tenth of the certiorari petitions filed. The Court rarely states why it is granting review either at the time of doing so or in its subsequent opinion on the merits. It is still rarer for the Court or an individual justice to state why a case is not being reviewed. The Court's rules of procedure shed little light on potential reasons for review. They simply state that "important" questions of federal law will be susceptible to review, including but not limited to a conflict between decisions of the U.S. Courts of Appeals on an issue of federal law.[6]

The importance of this agenda-setting function, coupled with the paucity of official explanations for why particular cases are reviewed and others are not, has drawn the attention of social scientists. Since as early as the 1950s, students of the Court have examined its certiorari policy and practice.[7] Most of the early studies sought to identify common characteristics of lower court decisions where certiorari was sought that made it more likely the Court would grant review. These included whether the federal government had sought review, whether there was a dissent in the case below or a conflict among decisions on the legal question presented, and the ideological direction of the decision below. More recent studies found other explanatory cues, such as whether and to what extent amicus curiae filed briefs in support of the certiorari petition. Still other researchers, drawing in part on the papers of retired justices or on interviews of justices and their law clerks, have examined whether the justices engaged in strategic voting on certiorari petitions (that is, how the latter decision relates to the eventual decision on the merits). In

[6] For a history of the Supreme Court's certiorari policy and relevant statistics, see Richard H. Fallon, Daniel J. Meltzer and David L. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 1691-1714 (Foundation, 4th ed 1996).

[7] In his comprehensive review of literature, H. W. Perry identifies the work of Glendon Shubert in the late 1950s, and that of Joseph Tanenhaus and his associates in the early 1960s, as the first to systematically study the certiorari process. H. W. Perry, *Agenda Setting and Case Selection*, in John B. Gates and Charles A. Johnson, eds, *The American Courts: A Critical Assessment* 235, 237 (CQ Press, 1991) ("Perry, *Agenda Setting*").

short, the literature suggests that a complex interplay of internal norms among the justices and characteristics of the cases where review is sought drives the certiorari process.[8]

The most recent theme in the literature has been to situate the certiorari process in a richer institutional context. Since the Supreme Court is formally at the apex of the judicial pyramid, the Court can be conceived as a principal directing (or attempting to direct) its agents, the lower courts.[9] In this model, justices, seeking (among other things) to advance their own policy preferences, will utilize certiorari review and reversal of divergent opinions to monitor how Courts of Appeal apply Supreme Court doctrine.[10] The cases that the Court places on its docket through the certiorari process also may reflect the societal forces that generate litigation and the justices' perception of the societal importance of certain issues.[11]

Scholars have not paid much attention to the Court's relatively recent and drastic reduction in its caseload. It has been suggested, using the principal-agent model, that the relatively conservative Rehnquist Court majority has found it less necessary to review (and reverse) more conservative decisions by the Courts of Appeals.[12] It has also been argued that the decline in caseload, irrespective (to a degree) of the cases actually reviewed, is best explained as a manifestation of the desire of a majority to the Court to reduce its role in the American legal system.[13]

[8] In our very brief review we do not claim to do justice to the now burgeoning literature. For excellent summaries and evaluations of the literature, by contributors to it, see in particular Lawrence Baum, *The Puzzle of Judicial Behavior* 78-83 (U Michigan, 1997); H. W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard U, 1991) ("Perry, *Deciding to Decide*"); Lawrence Baum, *Case Selection and Decision-Making in the U.S. Supreme Court*, 27 L & Socy Rev 443 (1993); Perry, *Agenda Setting*, at 235-53 (cited in note 7).

[9] See Donald R. Songer, Jeffrey A. Segal and Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court—Circuit Court Interactions*, 38 Am J Pol Sci 673 (1994). See generally Matt Spitzer and Eric Talley, *Judicial Auditing*, 29 J Legal Stud 649 (2000).

[10] See Charles M. Cameron, Jeffrey A. Segal and Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 Am Pol Sci Rev 101 (2000) (developing and testing a strategic model of Supreme Court certiorari decisions where the Court responds to signals and indices from courts of appeals, termed a "judicial signaling game," and finding that the Supreme Court was more likely to review liberal decisions by liberal courts).

[11] See Pacelle, *Supreme Court's Agenda*, at 23-34 (cited in note 4); Charles R. Epp, *External Pressure and the Supreme Court's Agenda*, in Cornell W. Clayton and Howard Gillman, eds, *Supreme Court Decision-Making: New Institutionalist Approaches* 255-79 (U Chicago, 1999).

[12] Frank B. Cross, *The Justices of Strategy*, 48 Duke L J 511, 557-61 (1998).

[13] See the perceptive analysis in Hellman, 1996 S Ct Rev 403 (cited in note 1).

B. En Banc Review in the Courts of Appeals

At their inception in 1891, U.S. Courts of Appeals (then known as circuit courts of appeals), each of which had three or fewer circuit judges, continued the circuit courts' tradition of deciding cases with three-judge panels. Responding to increasing appellate caseloads, Congress gradually expanded the number of authorized full-time, federal appellate judgeships to 179, ranging from six in the First Circuit to 28 in the Ninth Circuit.[14] The Supreme Court held that the entire circuit had the inherent authority to sit as a whole (i.e., "en banc") to decide cases, and Congress codified that holding shortly thereafter, in 1946.[15] Despite the en banc option, almost all cases continue to be decided by three-judge panels.

For the first two decades following the recognition of the en banc procedure, the circuits decided relatively few cases en banc. However, since that time, the number of cases heard en banc by the federal courts of appeals of general jurisdiction has increased fairly steadily as illustrated in Figure 1.[16] This figure is based on data from

[14] As of March 2001, the authorized judgeships per circuit were as follows:

Circuits	Number of Judges
District of Columbia	12
First	6
Second	13
Third	14
Fourth	15
Fifth	17
Sixth	16
Seventh	11
Eighth	11
Ninth	28
Tenth	12
Eleventh	12
Federal	12

28 USC §44(a). This understates the total numbers of judges, since scores of judges on senior status continue to sit on three-judge panels as well. See Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals* 38-39 (Federal Judicial Center, 1993) ("McKenna, *Structural and Other Alternatives*").

[15] The history and development of the en banc process is considered at greater length in Christopher P. Banks, *Judicial Politics in the D.C. Circuit* 91-96 (Johns Hopkins U, 1999) ("Banks, *D.C. Circuit*"); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 Wash L Rev 213, 220-32 (1999); Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U Pitt L Rev 805, 808-19 (1993). The Congressional statute is 28 USC § 46.

[16] Figure 1 reflects the raw number of all en banc decisions, including those following oral argument and those following submission on the briefs. For the period from 1941 through 1964, the numbers are those presented in A. Lamar Alexander, Jr., Note,

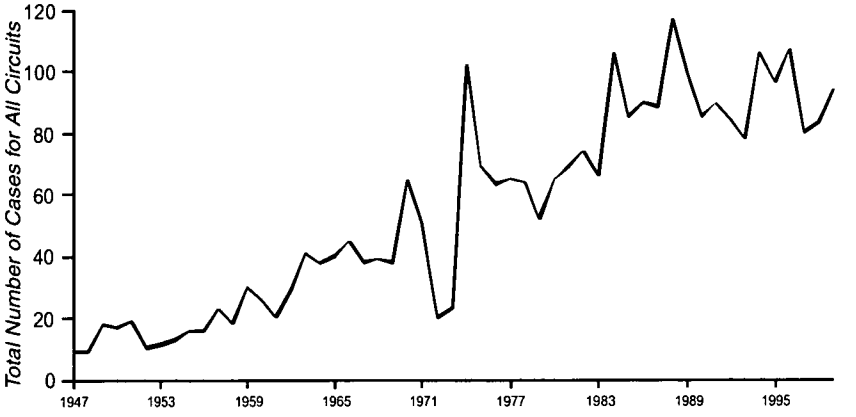

Figure 1. U.S. courts of appeals en banc decisions.

the Administrative Office of the United States Courts ("AO") for the post-1964 period, and therefore requires a caveat.[17] The AO simply reports the numbers submitted by circuits, and the meaning of these numbers appears to vary by circuit. For example, some circuits appear to report cases, while others report decisions. The practice appears to vary by circuit and by year as court personnel changes. Despite these variations, the data, which is relied upon by many scholars and reporters, is sufficient to indicate a *general* trend. While the number of en banc decisions has been steadily increasing, Figure 2 helps keep that number in perspective by comparing it with the total number of decisions, which also has increased. The relative number of en banc decisions has declined slightly since 1974, the first year for which relevant data is available.[18]

En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I), 40 NYU L Rev 563 & *Part II* 726, Appendix VI (1965). For 1966 through 1999, the numbers are those reported in the Annual Reports of the Administrative Office of the U.S. Courts (Table 7 for 1975, 1977-78, 1981, 1984-85; Table 9 for 1979-80, 1983; Table 8 for 1982; Table S-3 for 1986-1989; Table S-1 for 1990-1999). Raw numbers are reported in Appendix 1.

[17] For example, our research disclosed that the number of en banc decisions issued annually during the late 1990's was between 70 and 80, or roughly 20 fewer cases each year than the number reported by the AO. See Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U Pitt L Rev 1029, 1040 n 52 (1999) (also recognizing apparent discrepancies in AO en banc data). The variations appear to be attributable to differences between circuits rather than a different definition of en banc than the one used here.

[18] Figure 2 draws on the same Administrative Office data used in Figure 1. The numbers forming the basis of this figure are reported in Appendix 1. Because the AO only began regularly reporting terminations on the merits separate from all termina-

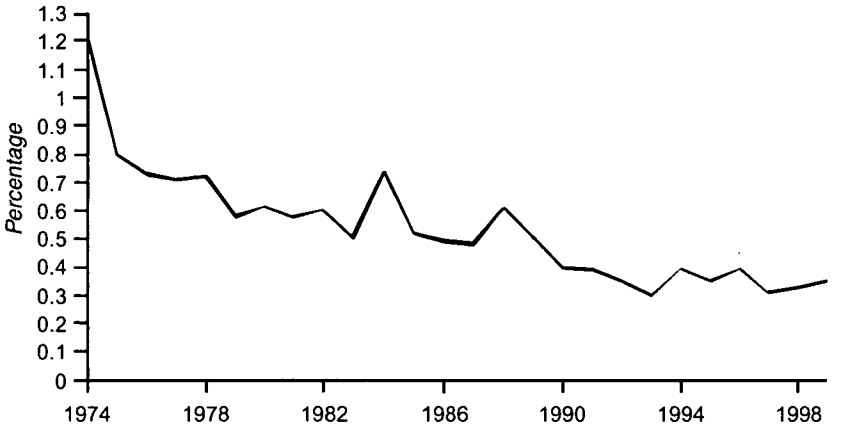

Figure 2. All en banc cases as a percentage of all merits terminations.

Why do circuit judges decide to rule on a case en banc? The formal legal standards provide only limited guidance. Federal Rule of Appellate Procedure 35(a) states that en banc rehearings are "not favored," but will be ordered when "necessary to secure or maintain uniformity" in the circuit's decisions, or when the case "involves a question of exceptional importance."[19] The Supreme Court has stated that the en banc process should be used to resolve intracircuit conflicts and to examine particularly significant disputes.[20] Cases and scholarly literature give some content to these highly discretionary

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tions in the term ending in 1974, we present the percentages beginning with that term. We use merits terminations rather than dismissals for any reason, such as settlement, because this provides a more meaningful comparison. To put the raw numbers in perspective for the earlier period, Appendix 1 reports the frequency of en banc decisions as a percentage of all terminations.

[19] Fed R App P 35 was first promulgated in 1967, and has been little changed since then. The rule was amended in 1998 to clarify that an issue of "exceptional importance" could include when a three-judge panel decision "conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed R App P 35(b)(1)(B).

[20] See, for example, *Textile Mills Sec. Corp. v. Commissioner*, 314 US 326, 334-35 (1941) (Douglas, authoring unanimous opinion) (sanctioning for the first time en banc practice in part because "[c]onflicts within a circuit will be avoided"); *Western Pac. R. R. Corp. v. Western Pac. R. R. Co.*, 345 US 247, 270-71 (1953) (Frankfurter, concurring) (explaining that the en banc procedure was recognized by the Court to allow courts of appeals to resolve intracircuit conflicts and to consider cases "extraordinary in scale"); *United States v. American-Foreign Steamship Corp.*, 363 US 685, 689 (1960) (observing that "[e]n banc courts are the exception, not the rule" and should be "convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit").

criteria.[21] A question of "exceptional importance" can involve an issue that frequently arises in or is otherwise highly relevant to the bar in that particular circuit.[22] Likewise, a panel ruling that is in direct conflict with the ruling of another appeals court may be a highly important case because of the hazards posed by circuit splits, which may prompt Supreme Court review.[23] But, en banc opinions, like Supreme Court opinions, only rarely explain why review was granted.[24]

Systematic examinations of en banc cases have found that the decision to grant en banc review can be explained by looking beyond the FRAP.[25] Scholars have hypothesized that political rather than legal reasons accounted for en banc practice, arguing, for example, that circuits staffed by Reagan appointees were using the en banc process mainly to overturn panel decisions by more liberal judges appointed by Democratic presidents. The studies found some support for the politicization thesis, both among all of the circuits[26] and

[21] For summaries and analysis of the case law and literature, see Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, 16A *Federal Practice and Procedure* § 3981.1 (West, 3d ed 1999); Michael E. Solimine, *Ideology and En Banc Review*, 67 NC L Rev 29, 54-56 (1988). The mere fact that a majority of a circuit's judges favor a full court hearing may be sufficient justification. But this position has been criticized as undermining the normal appellate process since *any* case may be subject to en banc review, even when litigants did not request it. Solimine, 67 NC L Rev at 48-50 (cited in note 21). On the other hand, en banc review permits the majority of judges on a circuit to monitor the law announced by the court and thereby increase certainty and predictability. See, for example, Stein, 54 U Pitt L Rev at 823-28 (cited in note 15).

[22] See Richard A. Posner, *The Federal Courts: Challenge and Reform* 381 (Harvard U, 1996) ("Posner, *Federal Courts*") (discussing the idea that one circuit only should disagree with the earlier holding of another circuit through the en banc process); Solimine, 67 NC L Rev at 56-60 (cited in note 21) (giving examples).

[23] See, for example, George, 74 Wash L Rev at 236 and notes 120-123 (cited in note 15) (discussing opinions, scholarship, and local circuit court rules suggesting that a circuit split should result in en banc rehearing).

[24] See Solimine, 67 NC L Rev at 65 (Table 4) and 70 (Table 6) (cited in note 21) (reporting that only 29% of all en banc opinions issued in 1985, 1986, and 1987 indicated why en banc review was appropriate).

[25] Both of the authors of the present article separately have reached this conclusion. One study of all en banc cases rendered in 1985, 1986 and 1987 concluded that less than half of the cases seemed appropriate for en banc treatment, applying the formal criteria in Fed R App P 35. Solimine, 67 NC L Rev at 63-70 (cited in note 21). The other study examined all of the en banc cases in the 2d, 4th and 8th Circuits from 1956 to 1996, and concluded *inter alia* that the formal criteria of the presence of an intracircuit or intercircuit conflict did not play a statistically significant role in explaining why a circuit went en banc. George, 74 Wash L Rev at 253-255 (cited in note 15).

[26] An initial study, by one of the authors of the present article, suggested the politicization thesis was overstated, in part because relatively few en banc cases showed strict ideological voting. Solimine, 67 NC L Rev at 62-64 (cited in note 21). Other

in particular circuits.[27] One recent empirical study found that the cases circuit courts selected for en banc review could be distinguished by the presence of a dissenting panelist, the reversal of a lower court or agency, and a liberal decision.[28]

Apart from circuit judges' reasons for granting en banc review, commentators do not agree on the appropriate institutional role of the en banc procedure. Some argue that en banc decisions consume too much time and too many resources, and undermine the finality of judicial rulings.[29] Other scholars counter that the en banc process increases intracircuit uniformity and reduces the impact of nonrepresentative three-judge panels.[30] Moreover, it has been argued that increased en banc review could lessen intercircuit conflicts and otherwise reduce the need for Supreme Court review, which is significant given increasing circuit court caseloads and the Court's decreasing inclination to review.[31]

C. The Intersection of the Certiorari and En Banc Processes

The last observation brings us to the focal point of this article. Phrased simply, in exercising its review, does the Supreme Court give any weight to the fact that the case below was decided en banc? In other words, is certiorari more likely to be sought by litigants and granted by the Court in en banc than in panel decisions?

The answer is not obvious from the standards the courts apply.

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and later studies, covering more en banc cases over longer periods of time, found considerable support for the politicization thesis among the circuits as a whole. See, for example, Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Court of Appeals*, 74 Judicature 133 (1990); Note, *The Politics of En Banc Review*, 102 Harv L Rev 864 (1989).

[27] For studies of particular circuits, see Banks, *D.C. Circuit*, at 96-107 (discussing D.C. Circuit) (cited in note 15); J. Robert Brown, Jr. and Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 Tex L Rev 1037, 1111-16 (2000) (discussing 4th Circuit); George, 74 Wash L Rev at 250-70 (discussing 2d, 4th and 8th Circuits) (cited in note 15); Phil Zarone, *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J App Prac & Proc 157 (2000) (discussing 4th and 5th Circuits).

[28] George, 74 Wash L Rev at 268-69 (cited in note 15).

[29] See Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 156-57 (West, 1994); Posner, *Federal Courts*, at 134-37 (cited in note 22); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U Chi L Rev 541, 546-50 (1989); Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 Ariz St L J 915, 985 (1991).

[30] See Stein, 54 U Pitt L Rev at 819-27 (cited in note 15).

[31] Stein, 54 U Pitt L Rev at 827-29 (cited in note 15). See also McKenna, *Structural and Other Alternatives*, at 67-71 (cited in note 14) (discussing various ways in which en banc review by the circuits might enhance national uniformity in the absence of Supreme Court review).

The formal criteria for review at both levels might suggest that en banc cases are more likely to be reviewed by the Court. Only "important" cases are supposed to be reviewed en banc, and only "important" cases are supposed to be granted certiorari. But "importance" may mean different things in the different contexts. An en banc case may be convened to resolve an intracircuit split or to address a subject of frequent litigation in the particular circuit, factors that presumably mean little to the Supreme Court.[32] Nor is principal-agent theory especially illuminating. That all of the judges on a circuit are deciding a case might suggest that they are less likely to diverge from Supreme Court doctrine (perhaps because they expect that the Court will be more likely to learn of any divergence).[33] But if an en banc case carries greater precedential weight,[34] any doctrinal divergence may matter more, creating greater incentive for circuit judges to follow their own preferences rather than Court precedent and also causing the Court to look harder at en banc cases.

The appropriate role of en banc review is also unclear. Some circuit court judges have openly stated that they did not vote to hear a case en banc because the Supreme Court was likely to hear an appeal of the three-judge panel anyway and therefore en banc review would be unnecessary.[35] Justices' opinions, however, have questioned the lower court's failure to hear the case en banc, perhaps suggesting that Supreme Court review would have been unnecessary had the case been heard en banc.[36] Moreover, fewer resources are required for rehearing en banc by the circuit than for petition and hearing by the Supreme Court.[37]

[32] The Supreme Court has indicated that circuit courts are responsible for resolving internal conflicts. *Wisniewski v. United States*, 353 US 901, 902 (1957).

[33] See Cross, 48 Duke L J at 563-64 (cited in note 12).

[34] See Solimine, 67 NC L Rev at 65 n 191 (cited in note 21) (addressing how citation analysis might be used to gauge the precedential value of en banc cases).

[35] See, for example, *Eisen v Carlisle & Jacquelin*, 479 F2d 1005, 1021 (2d Cir 1973) (Kaufman, concurring in denial of rehearing en banc, and Mansfield, concurring in denial of rehearing en banc), vacated and remanded, 417 US 156 (1974). For discussion and additional examples, see Solimine, 67 NC L Rev at 57 (cited in note 21); Stein, 54 U Pitt L Rev at 822-29 (cited in note 15); Stephen L. Wasby, *The Ninth Circuit and the Supreme Court: Relations Between Higher and Lower Courts* 35 (1998) ("Wasby, *Ninth Circuit*") (paper delivered at 1998 annual meeting of the American Political Science Association) (copy on file with Tracey George).

[36] See, for example, *Pounders v Watson*, 521 US 982, 991 (1997); *United States v Watts*, 519 US 148, 170 (1997) (Kennedy, dissenting). For discussion and additional examples in both court opinions and out-of-court statements, see Stephen L. Wasby, *The Supreme Court and Court of Appeals En Banc* 7-9 (2000) ("Wasby, *Supreme Court*") (paper delivered at 2000 annual meeting of the American Political Science Association) (copy on file with Tracey George).

[37] See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J Legal Stud 379, 401-03, 422-23 (1995) (questioning the relative value of another level

Until very recently, the literature on the en banc and certiorari processes said little about the possible importance of en banc review to the certiorari decision.[38] Beginning in the late 1980s research finally began to focus on the issue, and did indeed show, for example, that certiorari was sought and granted at a higher rate for en banc cases.[39] In the late 1990s, studies of the Ninth[40] and D.C. Circuits,[41] as well as samples drawn from all circuits,[42] also found that the Supreme Court disproportionately reviewed en banc cases. The most recent study found that, while the Court was more likely to review en banc cases generally, the Court was less likely to grant certiorari to cases from circuits with higher rates of en banc review.[43]

Although these studies enrich our understanding of the interaction between the en banc and certiorari processes, more can be done. For example, these studies focused on en banc cases reviewed by the

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of appeal due to the low probability that a second appellate court would discover previously unrecognized error and the costs of a second court's participation).

[38] See, for example, Estreicher and Sexton, *Redefining the Supreme Court's Role*, at 124-25, 190 n 12 (cited in note 4) (briefly discussing use of en banc decisions to create national law and to lessen review by Supreme Court); Perry, *Deciding to Decide*, at 250 (cited in note 8) (mentioning a Supreme Court law clerk's views that erroneous decisions below might not be reviewed because the circuit eventually could correct the error through the en banc process).

[39] See Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 Ohio St L J 1635, 1676-77, 1692-94 (1998) (evaluating en banc and non-en banc Fourth Circuit cases from 1962 through 1996); Solimine, 67 NC L Rev at 69 n 204 (cited in note 21) (evaluating all en banc cases from 1985 through 1987).

[40] Marybeth Herald and Stephen Wasby, motivated partly by Supreme Court reversal of three Ninth Circuit en banc cases during one term, independently examined the Ninth Circuit's en banc decisions. The three cases were: *California v Roy*, 519 US 2 (1996), *Arizonans for Official English v Arizona*, 520 US 43 (1997), and *Washington v Glucksberg*, 521 US 702 (1997). The studies are Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 Or L Rev 405, 411, 476-77 (1998); Wasby, *Ninth Circuit* at 24-31 (cited in note 35).

[41] See Banks, *D.C. Circuit*, at 107-15 (cited in note 15) (discussing Supreme Court review of en banc, and non-en banc, cases from the DC Circuit in the 1980s and 1990s). Banks' data on DC Circuit en banc decisions is from an earlier study, Douglas H. Ginsburg and Donald Falk, *The Court En Banc: 1981-1990*, 59 Geo Wash L Rev 1008 (1991).

[42] Stefanie Lindquist, Susan Haire and Donald R. Songer, *Supreme Court Monitoring of the Federal Circuit Courts: An Institutional Perspective*, 14-25 (2000) ("Lindquist et al, *Supreme Court Monitoring*") (paper delivered at 2000 Annual Meeting of the American Political Science Association) (copy on file with Tracey George); Wasby, *Supreme Court* at 11-24 (cited in note 36) (reporting that 8.3% of the circuit cases reviewed by the Supreme Court were en banc for the 1979 through 1988 terms and 6.4% were en banc for the 1989 through 1998 terms, and giving examples of when the Supreme Court discusses the en banc nature of the case below in its opinion).

[43] Lindquist et al, *Supreme Court Monitoring* at 19, 25 (cited in note 42).

Supreme Court, rather than examining all en banc cases in which certiorari petitions were filed. Examination of all petitions from en banc cases, including those that fail, is necessary to determine the characteristics other than en banc status that are most likely to lead to Supreme Court review.[44] Also, several of these studies used the aggregate data on en banc decisions in each circuit and year prepared by the Administrative Office of the United States Courts, which has shortcomings.[45] More substantively, the studies have only begun to disaggregate the factors that may lead the Supreme Court to review a case other than the presence or absence of the en banc factor. The remainder of the article seeks to fill some of these gaps.

III. EN BANC CASES AND SUPREME COURT CERTIORARI: DESCRIPTIVE STATISTICS

We study the relationship between en banc review and Supreme Court certiorari during the Rehnquist Court from October Term 1986 through October Term 1998. We focused on the Rehnquist Court for theoretical as well as methodological reasons. The Rehnquist Court has reviewed far fewer lower court rulings than its predecessors, prompting various competing explanations from different quarters. We want to contribute to this debate by considering whether the Rehnquist Court is responding to the same cues that influenced agenda-setting on earlier Courts. Our results can be compared to earlier studies of different Courts to evaluate whether the Rehnquist Court is granting cert to fewer cases as a general rule or for systematic reasons. Focusing on the Rehnquist era also provides a methodological advantage by controlling the variables that otherwise might affect certiorari rulings. In particular, the Court's conservative ideological majority and the Chief Justice's influence on agenda-setting were constant during the entire period.

To begin our study, we located all en banc cases decided during this period[46] and reviewed the subsequent history of each to determine whether a certiorari petition was filed and, if so, how the peti-

[44] See Wasby, *Supreme Court* at 1 (cited in note 36) (observing that it is helpful to examine how frequently the Court grants review of cases decided en banc).

[45] See, for example, Lindquist et al, *Supreme Court Monitoring* (cited in note 42).

[46] We built a list of en banc decisions during this period in several ways. We began by running a WESTLAW search of all courts of appeals rulings from 1986 through 1999. We looked for the word "banc" in the syllabi of those cases, and then reviewed each case to determine whether it was in fact an en banc decision. To look for the word in the text would have yielded far too many hits. The problem with just focusing on the syllabi, however, is that not all of the syllabi of en banc cases state that the case is en banc. See, for example, *United States v Banuelos-Rodriguez*, 215 F3d 969

tion was treated. We compared our findings about en banc cases in the certiorari process with reported findings for all certiorari petitions filed with the Rehnquist Court as set forth in Table 1.

As reflected in Table 1 and illustrated by Figure 3, losing parties in en banc cases are more than five times as likely as losing parties in panel decisions to file certiorari petitions. Moreover, as illustrated in Figure 4, the Rehnquist Court has been four times more likely to grant a hearing to parties who lost after the full circuit court considered their cases than to those who lost after a three-judge panel did so. These relative frequencies make it important to determine whether the en banc nature of the lower court ruling prompts the Court to grant certiorari or the same case characteristics that prompted the circuit court to hear the dispute en banc also prompt the Supreme Court to grant certiorari.

IV. TESTING A MODEL OF SUPREME COURT CERTIORARI GRANTS

A. The Variables

Studies of the Supreme Court's agenda-setting process have demonstrated the theoretical and statistical significance of several case and litigant characteristics that are independent variables in our model. The dependent variable is the Court's decision to grant certiorari (**Grant**$_i$), coded 1 if the Court granted certiorari, and 0 otherwise.

1. Case Characteristics

The Supreme Court's certiorari decision relates to the ideological direction of the circuit court's decision, the existence of an intercircuit conflict on an issue presented by the case, the presence of a dissenting panelist below, and whether the circuit court reversed the lower court or agency. We add to these variables the fact that the circuit court decided the case below en banc (**EB**), coded 1 if the case was en banc, 0 otherwise.

We expect that the Court is more likely to grant certiorari to

(9th Cir 2000) (en banc) We supplemented this list by adding citations of en banc cases discussed in published research on en banc decisionmaking, including our own empirical work examining en banc rulings that constructed lists of en banc rulings. Because the WESTLAW search found only about 80 percent of the second group of cases, we probably failed to find every en banc case. We believe that any missed cases are random (that is, they do not share relevant characteristics) based on our review of cases that the WESTLAW search failed to uncover. To obtain a complete list of en banc cases listed by case citation, contact Tracey George.

Table 1. A Comparison of Certiorari Petition Filing Rates and Grant Rates for En Banc Cases and All Circuit Cases: Rehnquist Court

	Percentage of Cases in which Cert Petitions were Filed		Percentage of Cases in which Filed Petitions were Granted	
Year	En Banc Cases[47]	*All Cases*[48]	En Banc Cases[49]	*All Cases*
1986	59.65%	*14.00%*	38.71%	*5.97%*
1987	59.38%	*13.93%*	32.26%	*6.09%*
1988	62.50%	*13.49%*	17.95%	*5.03%*
1989	43.55%	*12.50%*	20.83%	*4.26%*
1990	48.28%	*11.19%*	25.93%	*4.85%*
1991	56.14%	*10.79%*	12.50%	*4.20%*
1992	57.38%	*10.06%*	6.06%	*3.40%*
1993	47.62%	*9.48%*	5.00%	*3.19%*
1994	54.17%	*9.24%*	11.54%	*3.30%*
1995	69.23%	*8.86%*	20.00%	*3.74%*
1996	54.41%	*8.05%*	22.58%	*3.36%*
1997	64.38%	*8.15%*	15.22%	*3.56%*
1998	62.30%	*8.25%*	17.65%	*3.50%*
1986-98	56.00%	*10.31%*	18.37%	*4.22%*

[47] These percentages are based on our research on the subsequent procedural history of the en banc cases in the list we constructed.

[48] These percentages reflect the number of certiorari petitions filed in the Supreme Court's appellate docket, not including *in forma pauperis* petitions, as a percentage of all merits decisions by all circuit courts. The Supreme Court 1986-1995 terms are drawn from Lee Epstein et al, *The Supreme Court Compendium* (CQ Press, 2d ed 1996) ("Epstein et al, *Compendium*") and the 1996-1998 terms are drawn from Harvard Law Review's annual Supreme Court issue. The number of circuit court merit decisions is taken from the annual report of the Administrative Office of the United States Courts. The frequencies of certiorari filings and certiorari grants for en banc cases as compared to all cases are reported in Appendix 2.

[49] We exclude cases in which the Supreme Court granted certiorari and summarily vacated and remanded the en banc decision. We reason that such summary grants are different from grants in order to review a case on its merits, so that different factors may account for the Court's certiorari decision. The Supreme Court summarily vacated 2.85% of all en banc cases during this period (24 out of 841 cases), representing 5.10% of all en banc cases in which certiorari petitions were filed (24 out of 471). The percentage in this column reflects the number of petitions granted full review as a percentage of all petitions excluding summarily granted and dismissed petitions.

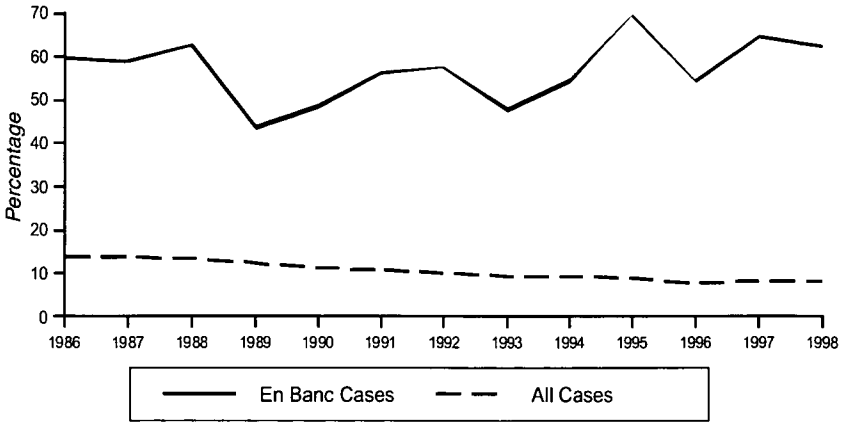

Figure 3. Percentage of cases in which cert petitions were filed.

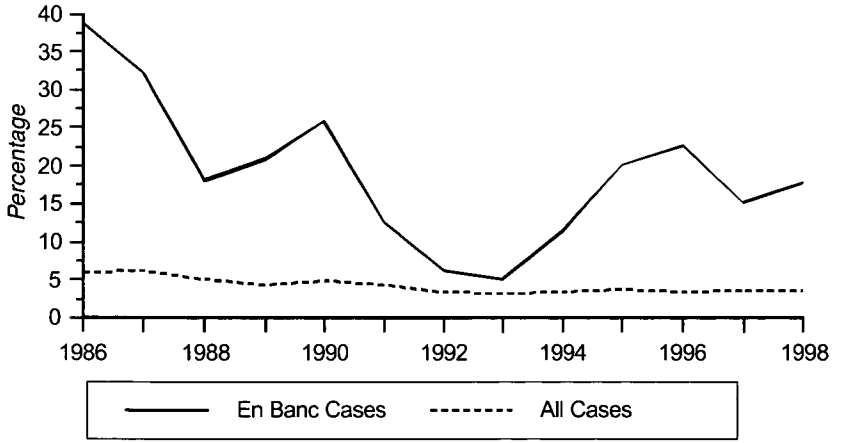

Figure 4. Percentage of granted petitions by year.

lower court decisions that are ideologically inconsistent with the Court's current majority, and that it is more likely to grant certiorari to reverse than to affirm the lower court.[50] Because only four justices

[50] See, for example, Virginia Armstrong and Charles A. Johnson, *Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?*, 15 Polity 141, 149 (1982) (finding that the Burger Court was more likely to grant certiorari to liberal appeals court rulings in civil liberties and economic liberties cases and the Warren Court was more likely to grant certiorari in conservative economic liberties cases but not in conservative civil liberties disputes); Robert L. Boucher, Jr., and Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive*

are required to issue a writ, a liberal minority could obtain review of a conservative circuit ruling. We assume, however, that liberal justices will behave strategically, refusing to vote for review of a conservative decision if the majority is likely to affirm and thereby to strengthen the disfavored lower court position.[51] Since the Rehnquist Court has been dominated consistently by a conservative majority, we hypothesize that the Rehnquist Court is more likely to grant certiorari to liberal circuit court decisions. Thus, we include a decision ideology variable (I) coded 1 if the circuit decision was liberal, and 0 if it was conservative.[52] The ideological variable, derived from categories used in the Supreme Court and Courts of Appeals Data Bases, reflects whether the court supports or opposes the issue to which the case pertains. In criminal, civil rights, first amendment, due process, privacy, and school desegregation cases, a decision is classified as liberal if it was pro-criminal defendant, pro-civil liberties or civil rights claimant, pro-indigent, pro-Indian, pro-affirmative action, pro-female in abortion (i.e., pro-choice), pro-underdog, anti-government in non-takings due process, or pro-disclosure (except employment or student records). For cases involving labor relations, economic regulation, or commercial activity, a decision is classified as liberal if it was pro-union (except in union anti-trust suits), pro-competition, anti-business, anti-employer, pro-liability, pro-injured person, pro-small business, pro-debtor, pro-bankrupt, pro-environmental protection, pro-consumer, pro-accountability, or pro-trial in arbitration. All cases in the sample were classified by ideological direction (that is, they fell into a substantive category).

Aside from the ideological content of lower court rulings, justices also seem to respond to the presence of an intercircuit conflict in

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Grants and Defensive Denials on the Vinson Court, 57 J Pol 824 (1995) (examining certiorari and merits votes of Vinson Court justices from 1946 through 1952 and finding that justices who voted to reverse a lower court decision were significantly more likely to have voted for certiorari than justices who voted to affirm); Saul Brenner and John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J Pol 828, 832-33 (1989) (concluding, based on a sample of cases from selected terms of the Vinson, Warren, and Burger Courts, that justices who voted in favor of certiorari were more likely to vote to reverse than justices who opposed certiorari, termed an "error-correcting strategy").

[51] See id (reporting that justices in the majority were more likely to have voted for certiorari than justices in the minority); Gregory A. Caldeira, John R. Wright and Christopher J. W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J L Econ & Org 549 (1999) (presenting substantial evidence that justices voted against certiorari when their views on the issues presented as measured by prior decisions were not supported by a Court majority).

[52] For more discussion of the decision ideology variable, see George, 58 Ohio St L J at 1673-75 (cited in note 39).

the case (**C**).[53] Studies have measured conflict by various means. We classified a case as involving an intercircuit split only if any member of the panel explicitly stated that another circuit or circuits had reached a different decision in analogous circumstances and if the conflict was express and direct rather than merely a matter of general or logical inconsistency.[54] We coded cases containing such a conflict as 1 and other cases as 0.

Principal-agent theory suggests that the Supreme Court will review a circuit court decision if it believes that the circuit violated the terms of the relational contract among the courts.[55] Monitoring the decisions of each circuit to learn if any three-judge or en banc panels have breached the agency agreement is costly. The Court will be more likely to learn of breach when a circuit judge dissents because that judge has access to better information and an incentive to set forth in an opinion reasons for Supreme Court review. Moreover, the mere fact of a dissent signals a problem with the case and therefore that the Court may justifiably expend resources to review the case or, at least, to look more closely at the petition for certiorari.[56] We coded cases with dissents (**D**) as 1, others as 0.

Studies also have found that a circuit court's reversal of a lower court or agency's decision may signal the Supreme Court that the case presents an issue demanding an authoritative review.[57] We

[53] See S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 Am Pol Sci Rev 901 (1984) (concluding, based on a sample drawn from the 1947-1976 terms, that "genuine" intercircuit conflict is statistically significantly correlated with the Court's decision to grant review).

[54] Judges may disagree as to whether a conflict indeed has been created. See Solimine, 67 NC L Rev at 40 n 53 (cited in note 21). To try to overcome this difficulty, we adopted the basic standard set forth by Thomas Goldstein, who writes the monthly *Circuit Split Roundup* for the Bureau of National Affairs: a case involves or produces a split if it "acknowledge[s] and describe[s] disagreements." Thomas Goldstein, *Circuit Split Roundup*, 66 US L Week 2655 (April 28, 1998). In seeking to distinguish true intercircuit conflicts from merely superficial inconsistencies, we also relied on the relevant insights from Arthur Hellman's test of whether conflict exists between the same circuit's decisions, his "Theory of Intracircuit Conflict". Hellman, 23 Ariz St L J at 922-41 (cited in note 29).

[55] See Cameron, Segal, and Songer, 94 Am Pol Sci Rev 101 (cited in note 10).

[56] See Patricia Wald, *The D.C. Circuit: Here and Now*, 55 Geo Wash L Rev 718, 719 (1987) (explaining that dissents are often considered by majority judges as signals to the Supreme Court that the case is worthy of a grant of certiorari). See also Frank B. Cross and Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L J 2155, 2159 (1998) (arguing that, under a sophisticated model of judicial behavior, circuit judges are most likely to dissent when a panel reaches a decision that is contrary both to existing Court precedent and to their preferences).

[57] See Gregory A. Caldeira and John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am Pol Sci Rev 1109 (1988) (observing that judicial clerks' memoranda on certiorari regularly note a circuit's reversal and pre-

coded a petition filed from a circuit's reversal (**R**) as a 1 and a circuit's affirmation as a 0.

2. Litigant Characteristics

Studies on the role of parties in the Supreme Court decision to grant certiorari require adding three variables. First, we include in our model whether the federal government (**US**) asked the Court to grant certiorari (coded 1), or not (coded 0),[58] based on research demonstrating that the Supreme Court is much more likely to grant petitions the Solicitor General has filed or has supported as an amicus.[59] The Solicitor General wields significant influence with the justices and has had tremendous success in both the petition and merits phases of Supreme Court litigation.[60] That success is consistent with the SG office's careful screening and selection of cases in which to seek Supreme Court review, long-standing relationship with the justices, and experience in Court litigation.[61] We do not distinguish SGs under Reagan and Bush from those under Clinton because studies consistently have found that the SG was successful at the certiorari phase (though not at the merits phase) regardless of whether the President was of the same party or ideology as the Court's majority.[62]

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senting systematic evidence that the Court is statistically significantly more likely to grant certiorari when the appeals court reversed the lower court or agency).

[58] We do not include in our analysis the few cases in which the federal government filed briefs opposing certiorari. We might not expect briefs opposing certiorari to be generally successful because the mere fact that a party invested resources to argue against Court consideration may draw more attention to a case. The exception would seem to be those cases in which the Court asks the Solicitor General for an opinion on the appropriateness of certiorari. Because our sample included only one case in which the SG gave a solicited opinion opposed to certiorari, we are unable to examine this hypothesis.

[59] See Joseph Tanenhaus, Marvin Schick, Matthew Muraskin and Daniel Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory,* in Glendon Schubert, ed, *Judicial Decision-Making* 111, 127 (Free Press, 1963); S. Sidney Ulmer, William Hintze and Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory,* 6 L & Socy Rev 640 (1972).

[60] See Lincoln Caplan, *The Tenth Justice—The Solicitor General and the Rule of Law* (Alfred A. Knopf, 1987).

[61] Doris Marie Provine, *Case Selection in the United States Supreme Court* 86-92 (U Chicago, 1980) (describing the reasons for the Solicitor General's success as a petitioner).

[62] Certiorari studies generally define the federal government variable by the party of the Court's majority rather than that of the President. See, for example, id at 87-90 (reporting that the U.S. was successful as petitioner and as amicus supporting a petition); Joseph Tanenhaus, Marvin Schick, Matthew Muraskin and Daniel Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory,* in S. Sidney Ulmer, ed, *Courts, Law and Judicial Processes* 273 (Free Press, 1981) (examining certiorari deci-

Second, amicus curiae may influence the certiorari process.[63] Amicus briefs often delineate reasons for granting review distinct from those expressed by the petitioner. Moreover, the mere fact of amicus participation indicates to the Court the relative importance of the case and the impact of a Court decision on a broader spectrum of society.[64] Therefore, we hypothesize that amicus curiae support for a writ increases the probability of a certiorari grant. We do not include amicus curiae opposition in our model because the limited evidence demonstrates that opposition actually increases slightly the probability of Court review and the incidence of such opposition was extremely rare in our sample, occurring in less than two percent of the cases and in no cases without amicus support as well. We recorded the presence of amicus curiae support for the petition for certiorari based on a review of briefs filed with certiorari petitions. The amicus curiae variable (**AC**) reflects whether parties other than the federal government supported the petitioner's request (coded 1 if at least one brief was filed, and 0 otherwise).

Finally, repeat players (**RP**) are more successful in obtaining Supreme Court review.[65] Litigators and parties who repeatedly appear in the high court will be better able to select cases in which to file petitions and to draft petitions that draw the Court's attention.[66] The Court often sees the involvement of repeat players as a signal that a case merits consideration.[67] We reviewed the briefs filed by

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sions during the 1947-1958 terms and finding that the Democratic-appointee-controlled Court was much more likely to grant certiorari to the federal government under both Truman and Eisenhower); Ulmer, 78 Am Pol Sci Rev at 908 (cited in note 53) (reporting that federal government petitioner was a strong predictor of the Court's certiorari decision from 1947 through 1976, a period during which the President and the Court were at times in conflict).

[63] See Gregory A. Caldeira and John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am Pol Sci Rev 1109 (1988) (finding that (1) one amicus curiae brief favoring certiorari statistically significantly increases the likelihood of review; (2) the greater the number of amicus curiae briefs filed in support of a certiorari petition the greater the likelihood of review; and (3) one or more amicus curiae briefs opposing certiorari weakly but statistically significantly increases the probability of review).

[64] See Kevin T. McGuire and Gregory A. Caldeira, *Lawyers, Organized Interests and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 Am Pol Sci Rev 717, 719 (1993); Gregory A. Caldeira and John R. Wright, *The Discuss List: Organized Interests and Agenda-Setting*, 24 L & Socy Rev 807, 822 (1990).

[65] See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L & Socy Rev 95 (1974).

[66] See Lee Epstein, *Courts and Interest Groups*, in John B. Gates and Charles A. Johnson, eds, *The American Courts: A Critical Assessment* 350-57 (CQ Press, 1991).

[67] See, for example, McGuire and Caldeira, 87 Am Pol Sci Rev at 723 (cited in note 64) (finding, in a study of obscenity cases, a positive though statistically insignificant relationship between state government petitioner and certiorari grants by the Burger Court but no relationship during the Warren Court).

petitioners and recorded whether the petitioning party or its counsel or both were public interest law groups or state attorneys general.[68] If so, we coded the repeat player variable as 1, otherwise as 0.

We can now specify our model of Supreme Court certiorari decisions in the following terms:

$$\Pr(\text{Grant}_i = 1) = \beta_0 + \beta_1 I_i + \beta_2 C_i + \beta_3 D_i + \beta_4 R_i + \beta_5 US_i + \beta_6 RP_i + \beta_7 AC_i + \beta_8 EB_i.$$

We expect all of the independent variables to be positively related to the dependent variable, the probability of granting certiorari (β_1, β_2, β_3, β_4, β_5, β_6, β_7, $\beta_8 > 0$).

B. The Data

The sampling design involves stratification on both exogenous and endogenous variables. We classified certiorari petitions from the Second, Fourth, and Eighth Circuits into two subsets based on the outcome variable of whether the Supreme Court granted certiorari. We utilized this endogenous, or choice-based, sampling method because the dependent variable in our model is a rare event: a certiorari denial is twenty-five times more likely than a grant.[69] Hence, gen-

[68] State attorneys general, like the U.S. Solicitor General, have the ability and incentive to review which cases justify certiorari petitions and to invest the state's limited resources in the cases that are most likely to gain the Court's attention. See Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 S Ct Econ Rev 233, 249-52 (1999) (positing that state attorney generals are motivated by concerns similar to those facing the U.S. Solicitor General when making decisions about participation as an amicus in Supreme Court litigation); Lee Epstein and Karen O'Connor, *States and the U.S. Supreme Court: An Examination of Litigation Outcomes*, 68 Soc Sci Q 660, 664 (1988) (finding that state governments with Supreme Court experience were very successful in decisions on the merits); Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 Judicature 298, 300-01 (1987) (describing the efforts of state attorneys general to improve their performance in the U.S. Supreme Court and in particular the work of the National Association of Attorneys General to persuade states to adopt the successful strategies employed by the Solicitor General).

[69] This procedure is known as choice-based sampling in the social science literature and case-control sampling in the epidemiology literature, and is commonly used in studies of Supreme Court certiorari decisions. See Charles F. Manski and Steven R. Lerman, *The Estimation of Choice Probabilities from Choice Based Samples*, 45 Econometrica 1977 (1977) (proving that a population's parameters may be inferred from the maximum likelihood estimators of a choice-based sample); Michael D. Green, D. Mical Freedman and Leon Gordis, *Reference Guide on Epidemiology*, in Federal Judicial Center, *Reference Manual on Scientific Evidence*, 342, 343 (Matthew Bender, 2d ed 2000), available in Adobe Acrobat format at <http://air.fjc.gov/public/fjcweb.nsf/pages/16> (visited on April 2, 2001) ("Green et al, *Reference Guide*") (explaining case-control studies in epidemiology).

eral random sampling would be insufficient to garner enough events (granting of certiorari) for purposes of prediction. Therefore, we sampled on the dependent variable, collecting a disproportionate number of events.[70]

We also selected petitions based on the exogenous en banc variable. We needed to sample cert petitions from en banc decisions at a higher rate than those from panel rulings because of the low relative occurrence of en banc hearing. Thus, our database consists of all petitions from en banc decisions seeking a writ of certiorari to the Second, Fourth, or Eighth Circuits and a random sample of petitions from panel decisions in those circuits. Seventy-one petitions filed from en banc decisions by these three circuits were either denied or granted full consideration. We excluded petitions that were either dismissed or treated summarily because the Court's ruling on those petitions was prompted by factors that are irrelevant to our hypotheses, such as the parties' settlement of the underlying dispute or the Court's contemporaneous holding in a similar dispute. The random sample of petitions from panel rulings issued by these three circuits contains 213 cases. In our logistic regression model, we weight the cases to reflect the true proportion of petitions filed from panel decisions as compared to petitions filed from en banc rulings during this period.[71]

[70] Maximum likelihood estimation is effective when using choice-based sampling, but the technique requires an appropriate adaptation of the equation. See Gary King and Langche Zeng, *Logistic Regression in Rare Events Data* (forthcoming, Poli Analysis); Gary King and Langche Zeng, *Explaining Rare Events in International Relations Data* (forthcoming, Intl Org) (Gary King's scholarship is available on his webpage at <http://gking.harvard.edu>) (visited on April 2, 2001); Charles F. Manski and Daniel McFadden, *Alternative Estimators and Sample Designs for Discrete Choice Analysis*, in Charles F. Manski and Daniel McFadden, eds, *Structural Analysis of Discrete Data With Econometric Applications* (MIT Press, 1981) ("Manski and McFadden, *Structural Analysis*").

[71] During the period of our study, petitions from en banc decisions accounted for approximately 2% of all certiorari petitions. We oversampled the petitions from en banc cases, so that they represent approximately 33% of the sample. As a result, petitions from en banc decisions are overrepresented by .33/.02 = 16.5, and petitions from panel decisions are underrepresented by .66/.98=.67. Thus, the en banc petitions must be weighted by .02/.33= .06, and the panel petitions must be weighted by .98/.66=1.48. See, for example, the weighting technique recommended for using the U.S. Courts of Appeals Data Base. *The United States Courts of Appeals Data Base, Documentation for Phase I* (ICPSR, 1996). See also Green et al, *Reference Guide* at 340-41 (cited in note 69) (explaining "cohort studies" in the study of disease which, like our study, involve the selection of observations based on an exogenous variable); Manski and Lerman, 45 Econometrica at 1985-87 (cited in note 69) (discussing the methodological implications of a *stratified* choice-based sample as compared to a *random* choice-based sample).

Table 2. Case Characteristics: Independent Variables Based on Circuit Court's Decision

		Liberal Lower Ct.		Intercircuit Split		Circuit Dissent		Reverse Trial Ct. or Agency		Total Petitions
En Banc	Cert Granted	7	38.9%	6	33.3%	17	94.4%	10	55.6%	18
	Cert Denied	23	43.4%	8	15.1%	52	98.1%	18	34.0%	53
Random Sample	Cert Granted	47	61.0%	18	23.4%	21	27.3%	35	45.5%	77
	Cert Denied	38	27.9%	16	11.8%	27	19.9%	45	33.1%	136

Table 3. Litigant Characteristics: Independent Variables Based on Certiorari Petition

		U.S. Petitioner or Amicus		Repeat Player Petitioner		Amicus (non-U.S.) Support		Total Petitions
En Banc	Cert Granted	5	27.8%	8	44.4%	3	16.7%	18
	Cert Denied	0	0.0%	16	30.2%	1	1.9%	53
Random Sample	Cert Granted	13	16.9%	27	35.1%	11	14.3%	77
	Cert Denied	3	2.2%	17	12.5%	22	16.2%	136

Tables 2 and 3 present relative frequencies for the independent variables other than en banc. Of the four characteristics of the circuit court's decision, two are statistically significantly correlated with the Supreme Court's decision to review panel decisions: the ideological direction of the panel's ruling and the panel's recognition of an intercircuit conflict.[72] None of the variables appears to be statistically significantly related to the Court's decisions on petitions from en banc rulings.[73]

As set forth in Table 3, the Supreme Court has granted more petitions supported by the United States than those filed by other parties, although repeat players also have fared well in petitions from

[72] The Pearson's chi-square test results for the relationship between these variables and the Court's certiorari decision in the random sample are: liberal court decision: $\chi^2=22.46$, $\rho<.0001$; intercircuit split: $\chi^2=4.94$, $\rho<.05$; circuit dissent: $\chi^2=1.55$, N.S.; and reverse: $\chi^2=3.21$, $\rho<.10$.

[73] The Pearsons chi-square test results for the significance of the relationship between these variables and the Court's certiorari decision in en banc cases are: liberal court decision: $\chi^2=.11$, N.S.; intercircuit split: $\chi^2=2.82$, $\rho<.10$; circuit dissent: $\chi^2=.66$, N.S.; and reverse: $\chi^2=2.62$, $\rho<.11$.

panel rulings.[74] The low relative numbers make it difficult to infer whether these variables alone were responsible for the Court's decision. However, multivariate controls will allow a consideration of the possible contribution of the petitioner's identity to the Court's cert ruling. Amicus support at the certiorari phase was unusual (there was almost never opposition) and does not appear to have been successful in support of petitions from panel rulings.[75] The amicus and U.S. support numbers are too small in the en banc subset to support meaningful inferences.

The relative frequencies reveal some interesting possibilities, but in isolation do not allow us to draw conclusions about any possible causal relationship. The next step is to consider the influence of each variable when controlling for the other hypothesized explanatory variables.

C. Multivariate Test of Supreme Court Review Model

We use logistic regression analysis to determine the *relative* influence of each particular variable on the Rehnquist Court's decision to grant certiorari by subjecting the individual variables (i.e., the panel characteristics) to multivariate controls. The resulting model's dependent variable is the probability that the Supreme Court would grant certiorari, and its independent variables are the litigant and case characteristics as well as the en banc treatment of the case. We weighted the cases to accurately reflect the population. The results are set forth in Table 4.

1. Non-En Banc Variables and Certiorari

Three case characteristics and two litigant characteristics statistically significantly increase the probability of the Supreme Court's granting certiorari. A dissenting judge, the circuit's treatment of the

[74] The Pearsons chi-square test results for the significance of the relationship between these two variables and the Courts certiorari decision in the random sample are: U.S. supports: $\chi^2=15.24$ $\rho<.0001$; and repeat player petitioner: $\chi^2=15.27$, $\rho<.0001$. The Fishers Exact Test, used because more than 50% of the cells have values below 5, for the relationship between U.S. support for a petition and the Courts decision in en banc cases is significant at the $\rho<.0001$ level. The three denials of certiorari petitions supported by the SG were during Republican administrations.

[75] Our results are interesting when compared to recent findings that the rate of amicus participation at the merits stage has been very high during the Rehnquist Court era, though not necessarily successful in influencing the Court's reasoning or judgments. See Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U Pa L Rev 743, 752-54, 789-93 (2000) (reporting that amicus briefs were filed in 85.10% of all Rehnquist Court cases (1986-95) and the average number of briefs filed per case was 4.23).

Table 4. Logistic Regression Results

Independent Variables	Parameter Est.	Standard Error	Sig ($\rho < x$)
En Banc Decision (EB)	1.30	.39	.001
Ideological Direction of Circuit Decision (D)	.72	.25	.01
Intercircuit Conflict (C)	1.02	.29	.001
Dissenting Circuit Judge (D)	.31	.29	NS
Circuit Court Treatment of Lower Court (R)	.20	.24	NS
Federal Government Supports Petition (US)	2.64	.39	.0001
Repeat Player Petitioner (RP)	1.32	.26	.0001
Amicus Curiae (AC)	−.26	.37	NS

−2 Log Likelihood = 726.1 ($\rho < .0001$)

lower court and the presence of an amicus brief are not statistically significant, and the sign on the amicus curiae coefficient is negative.

Our study generally supports prior research demonstrating the importance of litigant identity in Supreme Court agenda-setting. The Solicitor General's participation as petitioner or amicus is the single most influential characteristic of a petition: such a petition is nearly five times more likely to be granted than a petition without the SG's support.[76] The odds that a repeat player petition would be granted were three times higher than those for other petitions. However, other amicus participants did not have the anticipated positive effect on the Supreme Court's decision to grant certiorari.[77] Characteristics of the circuit court decision also influenced the Rehnquist Court's certiorari decisions. Circuit decisions citing intercircuit conflict, and those reaching a liberal outcome, were more than twice as likely to be granted certiorari than cases without these variables.

2. En Banc Variable and Certiorari

Finally, and most importantly for our current project, the en banc nature of the decision below increased the probability that the

[76] To understand how we calculated these probabilities, see Gary King, Michael Tomz and Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 Am J Pol Sci 347 (2000) (explaining in detail how to present statistical results in a meaningful way, including calculation of probability).

[77] Our results are consistent with recent research considering the relative importance of the Solicitor General, repeat players, and amicus curiae at the merits stage of Supreme Court decisionmaking. See Kearney & Merrill, 148 U Pa L Rev 743 (cited in note 75).

Rehnquist Court would grant certiorari. Petitions from en banc decisions were nearly three times as likely to be granted as compared to petitions from panel decisions. The statistically significant relationship between the en banc variable and the Supreme Court's certiorari decision could mean that the en banc nature of the lower court's decision itself increases the probably of Supreme Court review. On the other hand, that increased probability could be attributable to other variables, not included in our model, that also are related to the en banc variable. We consider here to what extent such non-en banc explanations, not included in our model, account for the Court's decision to grant review.

One possible non-en banc explanation would focus on the quality of the lawyers filing the petitions rather than on the parties deciding to pursue Supreme Court review. Lawyers representing losing en banc litigants may be better than lawyers representing losing panel litigants. We would expect that lawyers who had persuaded the court of appeals to grant rehearing en banc would be better able to persuade the Supreme Court to grant certiorari. There is reason to believe this hypothesis may be correct: certiorari petitioners who had successfully obtained en banc review below were somewhat more likely to win Supreme Court review than certiorari petitioners who had opposed en banc reconsideration. However, the parties who filed certiorari petitions from en banc losses were usually the ones who had opposed rather than sought en banc review. Thus, the advantage of better lawyers should not systematically distinguish en banc from panel cases.

Another explanation for the greater probability of en banc cases being granted certiorari may be that courts of appeals grant en banc review to the same types of cases that gain Supreme Court review. But then it would still be necessary to explain why the Court is more likely to grant certiorari in en banc cases than in panel cases with similar characteristics. Previous work on the decision to grant en banc review showed that nearly 90 percent of the decisions to grant en banc review in the Second, Fourth, and Eighth circuits could be attributed to a dissenting panelist, a panel reversing a trial court or administrative agency decision, or a liberal panel outcome.[78] Two-thirds of the panel rulings in our random sample had at least one of these three factors, and certiorari petitions were much more likely to be filed from panel rulings that had one of these characteristics than from other panel rulings.

In the end, we expect that the Supreme Court's certiorari decision is affected by the en banc nature of the lower court ruling in two

[78] George, 74 Wash L Rev at 219-20 (cited in note 15).

ways: en banc serves as a signal, and en banc cases are inherently more significant. The Supreme Court can rely on the en banc nature of the lower court's ruling as an easy-to-read signal that the case is worthy of consideration because, for example, it presents salient or complex legal questions. Moreover, a circuit court's en banc decisions are necessarily more important than panel decisions in terms of their precedential and persuasive value.

V. CONCLUSION

Our study provides evidence for an intuition held by many who study the federal courts, that the en banc nature of a decision is a significant factor in the Supreme Court's decision to grant review. The model controls for the variables previously demonstrated to affect the Court's agenda-setting behavior. Moreover, there is a theoretical basis for expecting the Court, when sorting through the thousands of certiorari petitions filed annually, to respond to the signal sent by en banc resolution below.

Our findings add another piece to the puzzle of the interaction between the Supreme Court and the circuit courts. However, our work also highlights questions that remain to be answered. For example, if the Court is more attentive to en banc hearings, does it also respond to dissents from denials of rehearing en banc? When a full circuit votes not to rehear a case en banc, usually that is simply noted without elaboration in the official reports. Occasionally, however, one or more judges dissent from the denial of rehearing en banc.[79] Former D.C. Circuit Judge Patricia Wald has suggested that such dissents are often "thinly disguised invitations to certiorari."[80]

We found some empirical support for Wald's contention that dissents from en banc denial correlate with Supreme Court review. Solimine found in a study of the 1985-1987 terms that litigants sought certiorari in 29 of the 58 cases where there were dissents from denial of rehearing en banc (50 percent), and the Supreme Court granted certiorari in 11 (19 percent).[81] In the present study, we found 142 cases in which judges dissented from denial of rehearing en banc. Losing parties sought Court review in 105 of those cases (74 percent), and the Court granted review in 30 (21 percent). These percentages are similar to those found for en banc cases as reported in Part III. These

[79] See Solimine, 67 NC L Rev at 64 (cited in note 21). Dissents usually are published separately and after the panel decision, though sometimes the dissents are published at the same time as the panel opinion. See, for example, *Lear v Cowan*, 220 F3d 825 (7th Cir 2000).

[80] Wald, 55 Geo Wash L Rev at 719 (cited in note 56).

[81] Solimine, 67 NC L Rev at 64-65 (cited in note 21).

figures suggest that dissents do serve as a signal to the Supreme Court. Additional evidence can be found in Supreme Court opinions referring to such dissents[82] and certiorari petitions relying on such dissents.[83] Further research is necessary to determine whether the dissents are a statistically significant contribution to the Court's higher probability of granting review to such cases.

Our results also provide further support for the recognized success of the Solicitor General before the Supreme Court as well as the significant, though less frequent, success of repeat players. And our finding that the conservative Rehnquist Court was much more likely to review liberal circuit rulings is consistent with the attitudinal model and with the strategic account of high court agenda-setting.

There are other avenues of possible further research. Most en banc cases are presumably important, however one defines that term, to the courts of appeals. But do those cases generate important cases on the Supreme Court's docket? A casual review of the list of those cases seems to indicate that several are indeed significant by any measure.[84] But more rigorous and testable definitions of importance are necessary.[85] Moreover, Supreme Court cases that were en banc below might be compared to en banc cases where certiorari was denied or not sought at all, or to cases where there was a dissent from denial of rehearing en banc.[86]

[82] For example, in the 1999 Term, the Court referred to such dissents in at least four cases: *United States v Locke*, 529 US 89, 98-99 (2000); *Board of Regents v Southworth*, 529 US 217, 228-29 (2000); *United States v Hubbell*, 530 US 27, 34 (2000); *Miller v French*, 530 US 327, 335 (2000). However, Wasby, *Supreme Court* at 23-24 (cited in note 36) argues that circuit judges rarely dissent from en banc denials because the Supreme Court does not respond.

[83] See, for example, Certiorari Petition in *Brentwood Academy v Tennessee Secondary School Athletic Ass'n*, 121 S Ct 924 (2001).

[84] See, for example, *United States v Morrison*, 529 US 598 (2000) (holding unconstitutional a provision of the Violence Against Women Act); *Faragher v City of Boca Raton*, 524 US 775 (1998) (providing rules for employer liability in sexual harassment cases); *Teague v Lane*, 489 US 288 (1989) (major habeas corpus case, generally limiting retroactive affect of newly announced constitutional rights); *Communications Workers v Beck*, 487 US 735 (1988) (limiting unions' rights to spend dues for political purposes). A full list of the en banc cases reviewed by the Supreme Court on the merits is set forth in Appendix 3.

[85] For example, the list of cases could be compared to the importance of cases as measured by the attention of the media or other interested publics. See Lee Epstein and Jeffrey A. Segal, *Measuring Issue Salience*, 44 Am J Pol Sci 66, 72 (2000).

[86] For examples of the latter, see *Coalition for Economic Equity v Wilson*, 122 F3d 692 (9th Cir 1997) (dissent from denial of rehearing en banc), cert denied, 522 US 963 (1998) (upholding constitutionality of California's Proposition 209, restricting affirmative action); *Hopwood v Texas*, 84 F3d 720 (9th Cir 1996) (dissent from denial of

Another avenue of research might concern whether the en banc nature of the case suggests any different treatment in the Court's resolution on the merits. For example, are such cases systematically more or less likely to be affirmed?[87] The rate of reversal in our sample of Second, Fourth and Eighth circuit en banc cases is about the same as the overall reversal rate reported for the Court, but a systematic study would require controls for ideological direction and other relevant variables. Exploring this question could shed light on the assertion that the justices take into account different considerations when deciding to grant certiorari than when deciding the case on the merits.[88]

More research also might be done on litigant behavior. Our data indicate that litigants are more likely to file certiorari petitions in en banc cases and in panel cases where there is a published dissent from denial of rehearing en banc than from other panel rulings. This suggests that litigants, or their attorneys, are aware of some factor in these cases that is likely to trigger Supreme Court review. Yet more work is necessary to model a theory of litigant behavior in this context. To what extent does the en banc nature of the case interact with other factors that influence litigants to file certiorari? Do attorneys emphasize the en banc status of the case in their briefing or at oral argument?

We observed at the beginning of this article that, while the Supreme Court and the en banc courts of appeals produce relatively few opinions annually, these are the most influential decisions issued by the federal judiciary. This study adds to our understanding of these important rulings by illuminating the intersection of these powerful institutions and the Supreme Court's efforts to monitor the collective action of the courts of appeals, the next most important set of courts in the federal system.

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rehearing en banc), cert denied, 518 US 1033 (1997) (holding unconstitutional University of Texas law school's affirmative action plan, and casting doubt on diversity rationale for such plans).

[87] See Wasby, *Supreme Court* (cited in note 36) (discussing this issue).

[88] For discussions of this distinction, see Perry, *Deciding to Decide* (cited in note 8); Baum, *Case Selection* (cited in note 8).

Appendix 1. Annual Frequency and Relative Frequency of U.S. Courts of Appeals En Banc Decisions

Year	En Banc Decisions	As Percentage of *ALL* Terminations	Year	En Banc Decisions	As Percentage of *Merits* Terminations
1947	9	*0.3%*	1974	102	*1.2%*
1948	9	*0.3%*	1975	69	*0.8%*
1949	18	*0.7%*	1976	63	*0.7%*
1950	17	*0.6%*	1977	65	*0.7%*
1951	19	*0.5%*	1978	64	*0.7%*
1952	10	*0.3%*	1979	52	*0.6%*
1953	11	*0.4%*	1980	65	*0.6%*
1954	13	*0.4%*	1981	69	*0.6%*
1955	16	*0.4%*	1982	74	*0.6%*
1956	16	*0.4%*	1983	66	*0.5%*
1957	23	*0.6%*	1984	106	*0.7%*
1958	18	*0.5%*	1985	85	*0.5%*
1959	30	*0.8%*	1986	90	*0.5%*
1960	26	*0.7%*	1987	88	*0.5%*
1961	20	*0.5%*	1988	117	*0.6%*
1962	29	*0.7%*	1989	99	*0.5%*
1963	41	*0.8%*	1990	85	*0.4%*
1964	38	*0.7%*	1991	89	*0.4%*
1965	49	*0.7%*	1992	84	*0.4%*
1966	45	*0.5%*	1993	78	*0.3%*
1967	38	*0.5%*	1994	106	*0.4%*
1968	39	*0.4%*	1995	96	*0.4%*
1969	38	*0.6%*	1996	107	*0.4%*
1970	65	*0.4%*	1997	80	*0.3%*
1971	51	*0.1%*	1998	83	*0.3%*
1972	20	*0.2%*	1999	94	*0.4%*
1973	23	*0.4%*			

Appendix 2. Certiorari Petitions Filed versus Petitions Granted Hearing and Merits Consideration

	En Banc Cases		All Cases			En Banc Cases		All Cases	
Year	Filed	Granted	Filed	Granted	Year	Filed	Granted	Filed	Granted
1986	34	12	2547	152	1993	20	1	2442	78
1987	37	9	2577	157	1994	26	3	2515	83
1988	40	7	2587	130	1995	36	7	2460	92
1989	27	5	2416	103	1996	37	7	2200	74
1990	28	7	2351	114	1997	47	6	2106	75
1991	32	4	2451	103	1998	38	4	2056	72
1992	35	2	2441	83					

Appendix 3. Rehnquist Court Decisions Reviewing En Banc U.S. Courts of Appeals

1986 term

US v Johnson, 481 US 681 (1987), rev'g 779 F2d 1492 (11th Cir 1986) (en banc).
Crawford Fitting Co. v J. T. Gibbons, Inc., 482 US 437 (1987), aff'g & rem'g 790 F2d 1174 (5th Cir 1986) (en banc).
City of Houston, Tex. v Hill, 482 US 451 (1987), aff'g 789 F2d 1103 (5th Cir 1986) (en banc).
Ricketts v Adamson, 483 US 1 (1987), rev'g 789 F2d 722 (9th Cir 1986) (en banc).
Welch v Texas Dept. of Highways and Public Transp., 483 US 468 (1987), aff'g 780 F2d 1268 (5th Cir 1986) (en banc).
Greer v Miller, 483 US 756 (1987), rev'g 789 F2d 438 (7th Cir 1986) (en banc).

1987 term

Omni Capital Int'l v Rudolf Wolff & Co., 484 US 97 (1987), aff'g 795 F2d 415 (5th Cir 1986) (en banc).
Mullins Coal Co. v Director, Office of Workers' Compensation Pro., 484 US 135 (1987), rev'g 785 F2d 424 (4th Cir 1986) (en banc).
Carnegie Mellon Univ. v Cohill, 484 US 343 (1988), aff'g 1986 WL 192735 (3rd Cir 1986) (en banc).
United Sav. Ass'n of Texas v Timbers of Inwood Forest Associates, Ltd., 484 US 365 (1988), aff'g 808 F2d 368 (5th Cir 1987) (en banc).
Haig v Bissonette, 485 US 264 (1988), aff'g 800 F2d 812 (8th Cir 1986) (en banc).
United States v Providence Journal Co., 485 US 693 (1988), dismissing 820 F2d 1354 (1st Cir 1987) (en banc).
Meyer v Grant, 486 US 414 (1988), aff'g 828 F2d 1446 (10th Cir 1987) (en banc).
Maynard v Cartwright, 486 US 356 (1988), aff'g 822 F2d 1477 (10th Cir 1987) (en banc).
Loeffler v Frank, 486 US 549 (1988), rev'g 806 F2d 817 (8th Cir 1986) (en banc).
West v Atkins, 487 US 42 (1988), rev'g 815 F2d 993 (4th Cir 1987) (en banc).
Frisby v Schultz, 487 US 474 (1988), aff'g 822 F2d 642 (7th Cir 1987) (en banc).
Communications Workers of America v Beck, 487 US 735 (1988), aff'g 800 F2d 1280 (4th Cir 1986) (en banc).

1988 term

Beech Aircraft Corp. v Rainey, 488 US 153 (1988), aff'g in part, rev'g in part 827 F2d 1498 (11th Cir 1987) (en banc).
Perry v Leeke, 488 US 272 (1989), aff'g 832 F2d 837 (4th Cir 1987) (en banc).
Teague v Lane, 489 US 288 (1989), aff'g 820 F2d 832 (7th Cir 1987) (en banc).
Schmuck v United States, 489 US 705 (1989), aff'g 840 F2d 384 (7th Cir 1988) (en banc).
Newman-Green, Inc. v Alfonzo-Larrain, 490 US 826 (1989), rev'g 854 F2d 916 (7th Cir 1988) (en banc).
United States v Monsanto, 491 US 600 (1989), rev'g 852 F2d 1400 (2d Cir 1988) (en banc).
Caplin & Drysdale v United States, 491 US 617 (1989), aff'g 837 F2d 637 (4th Cir 1988) (en banc).
Murray v Giarratano, 492 US 1 (1989), rev'g 847 F2d 1118 (4th Cir 1988) (en banc).

1989 term

Zinermon v Burch, 494 US 113 (1990), aff'g 840 F2d 797 (11th Cir 1988) (en banc).
Perpich v Dept. of Defense, 496 US 334 (1990), aff'g 880 F2d 11 (8th Cir 1989) (en banc).
Rutan v Republican Party of Illinois, 497 US 62 (1990), aff'g in part, rev'g in part 868 F2d 943 (7th Cir 1989) (en banc).
Hodgson v Minnesota, 497 US 417 (1990), aff'g 853 F2d 1452 (8th Cir 1980) (en banc).

1990 term

International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v Johnson Controls, Inc., 499 US 187 (1991), rev'g 886 F2d 871 (7th Cir 1989) (en banc).
International Organization of Masters, Mates and Pilots v Brown, 498 US 466 (1991), aff'g 889 F2d 58 (4th Cir 1989) (en banc).
E.E.O.C. v Arabian American Oil Co., 499 US 244 (1991), aff'g 892 F2d 1271 (5th Cir 1990) (en banc).
Edmonson v Leesville Concrete Co., Inc., 500 US 614 (1991), rev'g 895 F2d 218 (5th Cir 1990) (en banc).
Renne v Geary, 501 US 312 (1991), vac'g 911 F2d 280 (9th Cir 1990) (en banc).
Houston Lawyers' Ass'n v Attorney General of Texas, 501 US 419 (1991), rev'g 914 F2d 620 (5th Cir 1990) (en banc).
Barnes v Glen Theatre, Inc., 501 US 560 (1991), rev'g 904 F2d 1081 (7th Cir 1990) (en banc).

1991 term

Jacobson v United States, 503 US 540 (1992), rev'g 916 F2d 467 (8th Cir 1990) (en banc).
Sawyer v Whitley, 505 US 333 (1992), aff'g 881 F2d 1273 (5th Cir 1989) (en banc).
Estate of Cowart v Nicklos Drilling Co., 505 US 469 (1992), aff'g 927 F2d 828 (5th Cir 1991) (en banc).
United States v Fordice, 505 US 717 (1992), vac'g 914 F2d 676 (5th Cir 1990) (en banc).

1992 term

Soldal v Cook County, Ill., 506 US 56 (1992), rev'g 942 F2d 1073 (7th Cir 1991) (en banc).
Graham v Collins, 506 US 461 (1993), aff'g 950 F2d 1009 (5th Cir 1992) (en banc).
Building and Const. Trades Council of Metropolitan Dist. v Associated Builders

and Contractors of Massachusetts/Rhode Island, Inc., 507 US 218 (1993), rev'g 935 F2d 345 (1st Cir 1991) (en banc).
Reno v Flores, 507 US 292 (1993), rev'g 942 F2d 1352 (9th Cir 1991) (en banc).

1993 term
United States v Irvine, 511 US 224 (1994), rev'g 981 F2d 991 (8th Cir 1992) (en banc).
Livadas v Bradshaw, 512 US 107 (1994), rev'g 987 F2d 552 (9th Cir 1993) (en banc).

1994 term
United States v Gaudin, 515 US 506 (1995), aff'g 28 F3d 943 (9th Cir 1994) (en banc).
United States v Aguilar, 515 US 593 (1995), aff'g in part, rev'g in part, 21 F3d 1475 (9th Cir 1994) (en banc).

1995 term
Bailey v United States, 516 US 137 (1995), rev'g 36 F3d 106 (DC Cir 1994) (en banc).
Brotherhood of Locomotive Engineers v Atchison, Topeka and Santa Fe Railroad Co., 516 US 152 (1996), aff'g 44 F3d 437 (7th Cir 1995) (en banc).
Neal v United States, 516 US 284 (1996), aff'g 46 F3d 1405 (7th Cir 1995) (en banc).
United States v Armstrong, 517 US 456 (1996), rev'g 48 F3d 1508 (9th Cir 1995) (en banc).
Denver Area Educational Telecommunications Consortium, Inc. v FCC, 518 US 727 (1996), aff'g in part, rev'g in part 56 F3d 105 (D.C. Cir 1995) (en banc).

1996 term
Robinson v Shell Oil Co., 519 US 337 (1997), rev'g 70 F3d 325 (4th Cir 1995) (en banc).
Schenck v Pro-Choice Network of Western New York, 519 US 357 (1997), aff'g in part, rev'g in part 67 F3d 377 (2d Cir 1995) (en banc).
Arizonans for Official English v Arizona, 520 US 43 (1997), vac'g 69 F3d 920 (9th Cir 1995) (en banc).
United States v Lanier, 520 US 259 (1997), vac'g 73 F3d 1380 (6th Cir 1996) (en banc).
Strate v A-1 Contractors, 520 US 438 (1997), aff'g 76 F3d 930 (8th Cir 1996) (en banc).
Associates Commercial Corp. v Rash, 520 US 953 (1997), rev'g 90 F3d 1036 (5th Cir 1996) (en banc).
O'Dell v Netherland, 521 US 151 (1997), aff'g 95 F3d 1214 (4th Cir. 1996) (en banc).
Lindh v Murphy, 521 US 320 (1997), rev'g 96 F3d 856 (7th Cir.1996) (en banc).
Washington v Glucksberg, 521 US 702 (1997), rev'g 79 F3d 790 (9th Cir 1996) (en banc).

1997 term
Kawaauhau v Geiger, 523 US 57 (1998), aff'g 113 F3d 838 (8th Cir 1997) (en banc).
Calderon v Thompson, 523 US 538 (1998), rev'g 120 F3d 1045 (9th Cir 1997) (en banc).
Crawford-El v Britton, 523 US 574 (1998), vac'g 93 F3d 813 (DC Cir 1996) (en banc).
Caterpillar, Inc. v International Union United Automobile, Aerospace and Agr. Implement Workers of America, 523 US 1015 (1998), dismissing 107 F3d 1052 (3rd Cir 1997) (en banc).
FEC v Akins, 524 US 11 (1998), vac'g 101 F3d 731 (DC Cir 1996) (en banc).
United States v Bestfoods, 524 US 51 (1998), vac'g 113 F3d 572 (6th Cir 1997) (en banc).

Burlington Industries, Inc. v Ellerth, 524 US 742 (1998), aff'g 123 F3d 490 (7th Cir 1997) (en banc).
Faragher v City of Boca Raton, 524 US 775 (1998), rev'g 111 F3d 1530 (11th Cir 1997) (en banc).

1998 term
Ruhrgas AG v Marathon Oil Co., 526 US 574 (1999), rev'g 145 F3d 211 (5th Cir 1998) (en banc).
Wilson v Layne, 526 US 603 (1999), aff'g 141 F3d 111 (4th Cir 1998) (en banc).
Davis v Monroe County Bd. Of Educ., 526 US 629 (1999), rev'g 120 F3d 1390 (11th Cir 1997) (en banc).
Amoco Production Co. v Southern Ute Indian Tribe, 526 US 865 (1999), rev'g 151 F3d 1251 (10th Cir 1998) (en banc).
Jefferson County, Ala. v Acker, 527 US 423 (1999), rev'g 137 F3d 1314 (11th Cir 1998) (en banc).
Kolstad v American Dental Ass'n, 527 US 526 (1999), vac'g 139 F3d 958 (DC Cir 1998) (en banc).

1999 term
United States v Morrison, 529 US 598 (2000), aff'g 169 F3d 820 (4th Cir 1999) (en banc).
Hartford Underwriters Ins. Co. v Union Planters Bank, N.A., 530 US 1 (2000), aff'g 177 F3d 719 (8th Cir 1999) (en banc).